

**Statement of Kent Holsinger
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**REGARDING S. 2508, THE COLORADO UTE SETTLEMENT ACT AMENDMENTS
OF 2000.**

United States Senate
Committee on Indian Affairs

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Introduction

The State of Colorado appreciates the opportunity to submit these comments in support of S. 2508, the Colorado Ute Settlement Act Amendments of 2000. This legislation, introduced by U.S. Senator Ben Nighthorse Campbell and cosponsored by U.S. Senator Wayne Allard provides for the final settlement of long-standing tribal water rights issues in the "Colorado Ute Indian Water Rights Settlement Act of 1988" (Settlement Act) ratified by Congress. With this legislation, Colorado and the Ute Tribes are simply seeking to complete what has long been promised.

To understand the need for S. 2508, one must appreciate the long struggle of the Colorado Ute Tribes and their non-Indian neighbors along with the States of Colorado and New Mexico to provide the Tribes with a reliable water supply without taking water away from their neighbors.

We have history on our side. Despite the controversy and divisiveness that has been generated by the Animas-La Plata Project (ALP), there exists an extraordinary partnership between the States of Colorado and New Mexico, and the Indian and non-Indian communities in southwestern Colorado and northwestern New Mexico. Together, we have successfully quantified Tribal reserved rights claims, and implemented most of the Settlement Agreement, in a unique way that serves as a national model. More than that, however, is a genuine sense of pride that exists between the Indian and non-Indian communities in the area over shared use and development of water and mineral resources, economic opportunity, and preserving the quality of life and environmental heritage of the area.

Through this legislation, we have avoided protracted, expensive and divisive litigation. We have preserved non-Indian economics and provided for stable development of Tribal economies. We have avoided the social disruption resulting from the enforcement of reserved rights claims. We have integrated the administration of Indian and non-Indian water rights.

Accomplishing these results has required vision, extraordinary leadership, respect for the needs of all sides, a willingness to listen to and explore new solutions, and a commitment to stay at the table until a solution is reached.

Historical Context

The original Ute Reservation was established by treaty in 1868, prior to the arrival of non-Indian settlers to the area. The arrival of non-Indians resulted in conflicts, and reconfiguration of the Reservation lands. In 1895, Indians living on the Reservation were given the option of settling on 160-acre allotments, or moving to the western portion of the Reservation. Non-Indians were able to acquire some of these allotments as well. In 1934 this homesteading process was closed. The result was the present configuration of checkerboard Indian and non-Indian lands on the Southern Ute Reservation and the contiguous block nature of the Ute Mountain Ute Reservation. These lands are downstream from non-Indian development in Colorado. Almost every river in southwestern Colorado passes through one or both of the Reservations.

The rights of Indian Tribes to reserved water are based on the date of the reservation.¹ In the late 1800's non-Indian irrigation was beginning upstream from the Reservation, on the Pine River. The Southern Ute Tribe filed claims for irrigation purposes in 1895, and water litigation ensued until 1930, when a federal court awarded the Indian claimants the number one water right on the Pine River. This created a severe water shortage for the non-Indian irrigators, and resulted in the construction of Vallecito Dam in 1941, to serve both Indian and non-Indian lands.

In contrast, the Mancos Project was developed on the Mancos River by 1950. Although the Mancos River is the primary river through the Ute Mountain Ute Reservation, the Tribe did not receive the benefit of water service from the Project. In fact, the town of Towaoc did not even have a potable water supply until 1990, under the implementation of the 1986 Settlement Agreement.

Plans were also moving forward for comprehensive water development throughout the Upper Colorado River Basin. In 1956, Congress enacted the Colorado River Storage Project Act.² This Act authorized the construction of initial CRSP units – Curecanti, Flaming Gorge, Navajo and Glen Canyon; participating projects – including the Florida Project; and the preparation of planning reports – including the Animas-La Plata and Dolores Projects. The Florida Project was completed to serve lands on Florida Mesa in 1963, which included some Indian lands but which did not completely meet Indian needs.

The CRSP Act also established a mechanism for assisting in the funding of construction of these and other projects, through the creation of the Upper Colorado River Basin Fund (the “Basin Fund”). In short, hydroelectric power revenues generated from the CRSP are credited to the Fund to pay for certain construction, operation and maintenance costs of the initial CRSP units. The balance of any revenues are credited to each of the upper basin states to pay for that portion of the construction costs of participating projects allocated to irrigation, that are beyond the ability of irrigation contractees to repay. Additionally, participating projects can take advantage of favorable rates for CRSP power.

¹ Winters v. United States, 207 U.S. 564 (1908)

² P.L. 84-485; 70 Stat. 105; 43 U.S.C. 620

In 1968, Congress enacted the Colorado River Basin Project Act(CRBP).³ Among other things, the CRBP Act authorized the constructions of the Animas-La Plata and Dolores Projects, concurrent with the completion of the Central Arizona Project. The authorization for the Animas-La Plata project was for a configuration substantially different than the presently proposed configuration.⁴ However, the Project was always contemplated to serve both Indian and non-Indian municipal, industrial and irrigation needs.⁵

Thus, as of the late 1960's, there was some resolution of Tribal claims, and a good deal of water development undertaken and contemplated in the San Juan River Basin. Some but not all of this development benefited the Tribes. However, quantification of Tribal claims, and their impact on non-Indians, were certainly open questions. The United States Supreme Court⁶ established a test for the amount of such claims, based on practicably irrigable acreage, which included both present and future irrigation needs.

Quantification of the Tribal claims in Colorado commenced in 1972, when the United States Department of Justice filed reserve rights claims on behalf of the two Ute Tribes in federal district court. The state of Colorado and other parties intervened, and moved to dismiss on the grounds that under the McCarren Amendment⁷ jurisdiction belonged in state water court. The United

³ P.L. 90-537; 82 Stat. 885; 43 U.S.C. 1505

⁴ Section 501(c) of the 1968 CRBP Act provides that the A-LP Project be constructed "in substantial accordance with the engineering plans set out in the report of the Secretary transmitted to the Congress on May 4, 1966, and printed as House document 436, Eighty-ninth congress..." In contrast to the present configuration, the Project then contemplated the construction of Howardsville Reservoir above Silverton, a diversion from the Animas River near Electra Lake above Durango, Animas Mountain Reservoir, and extensive facilities in the La Plata Basin, including Hay Gulch Reservoir, Three Buttes Reservoir and Ute Meadows Reservoir.

⁵ Changes in the proposed configuration of the Project were made in the 1966 Report included in House Document 436, to increase municipal and industrial supplies, and decrease irrigation supplies. A summary of the proposal water supply and depletions as of the 1968 CRBP Act is as follows:

Animas-La Plata Project Water Supply -- 1968				
	Irrigation (af/yr)	Municipal and Industrial (af/yr)	Total Supply (af/yr)	Total Depletion (af/yr)
Colorado	138,900	62,700	201,600	112,300
New Mexico	50,000	13,500	63,500	34,100
Total	188,900	76,200	265,100	146,400
Ute Mountain	21,730	23,500	45,230	22,100
Ute Tribe				
Southern Ute	1,370	30,000	31,370	22,700
Tribe				
Total (Included in state's share above)	23,100	53,500	76,600	44,800

⁶ Arizona v. California, 373 U.S. 546 (1963)

⁷ 43 U.S.C. 666. The McCarren amendment consents to the joinder of the United States as a defendant in any suit for the adjudication of water rights where the United States owns or is acquiring such rights.

States Supreme Court ⁸ ruled that state court was the most appropriate forum in which to achieve integrated adjudication of reserved right claims. Immediately thereafter, the United States filed extensive claims in state water court.⁹

The Tribal claims encompassed the potential irrigation of some 93,000 acres, in over 25 stream systems. Most of these lands were in the La Plata and Mancos River Basins, which were water-short and over-appropriated. Success by the Tribes would totally eliminate existing non-Indian irrigation, disrupting local economies and creating hostility.

The 1986 Settlement Agreement and Subsequent Legislation

In April 1985, many parties, public and private, convened negotiations to address the issues raised by the Tribe's reserved rights claims. The State of Colorado's negotiating position was based on several principles:

vested property rights held by owners of state decreed water rights would not be compromised;

existing economies should be protected;

existing uses should be protected by a "no injury" standard;

reserved rights claims should be quantified by state water court, not by Congress or in federal courts; and

the Tribes' legitimate needs, such as the lack of a potable water supply for Towaoc, should be met.

After intense and complex negotiations, an agreement in principle was reached that included a binding cost-sharing agreement for construction of the Animas-La Plata Project. This agreement was titled the "Agreement in Principle Concerning the Colorado Ute Indian Water Rights Settlement and Binding Agreement for Animas-La Plata Project Cost Sharing." By signing the Agreement in Principle, the Secretary of Interior certified that the non-federal cost share contributions were reasonable, allowing for the federal release of the first \$1 million for

⁸ Akin v. United States, 424 U.S. 800 (1976)

⁹ These claims were originally filed as one pleading in the water court for Division No. 7, and Case No. W-1603-76, and sought confirmation of the reserved rights held by the United States in trust for the Ute Mountain Ute and Southern Ute Tribes, individual Indians owning trust allotments on the Southern Ute Reservation, and the Bureau of Indian Affairs. Subsequently, the application was amended and eleven separate applications were filed, each amended applications asserting water rights associated with a specific river: W-1603-76 (Navajo River); W-1603-76A (Blanco River); W-1603-76B (San Juan River); W-1603-76C (Piedra River); W-1603-76D (Pine River); W-1603-76E (Florida River); W-1603-76F (Animas River); W-1603-76G (Mancos River); W-1603-76H (Dolores River); W-1603-76I (McElmo Creek); and W-1603-76J (La Plata River).

construction of the Project. In addition to the cost-sharing element of the Agreement, the parties to the state water court litigation agreed to a set of principles that established the parameters for settlement of the reserved rights claims.

After six months of negotiations. The Colorado Ute Indian Water Rights Final Settlement Agreement was signed on December 10, 1986. The Settlement Agreement contains six major elements.¹⁰

1. In each of the drainage basin, the reserved rights of the Tribes were quantified. (See addendum.)
2. The Tribes waived ancillary breach of trust claims against the United States.
3. The Tribes agreed to specific conditions concerning the administration and use of reserved water rights, so as to integrate such administration into administration of non-Indian water rights. These conditions included beneficial use as a limiting condition, monitoring of water usage, sharing of streamflow data, and judicial change in use proceedings in Colorado state water court when required. The state court was given jurisdiction over all water in the Reservations not decreed to the tribes as reserved water rights, including both unappropriated water and state appropriative rights. The parties agreed to the entry of consent decrees in state water court.
4. The Tribes received commitments to obtain \$60.5 million in Tribal Development Funds, to enable the development of water and assist in economic self-sufficiency.¹¹
5. The non-federal parties agreed to significant cost sharing of the Animas-La Plata Project and Tribal Development Funds.¹² The parties agreed to seek Congressional deferral of Tribal repayment of certain project costs until the water from the projects was actually put to beneficial use.

¹⁰ The following is a summary of the Agreement, and shall not be construed to interpret any of its provisions, or be binding on any of the parties thereto.

¹¹ Of this amount, \$20 million was to be earmarked for the Southern Ute Tribe, and \$40.5 million for the Ute Mountain Ute Tribe. The Funds were created by the following contributions:
\$5 million from the State of Colorado Department of Natural Resources
\$6 million from the state of Colorado in the form of the construction of the Towaoc Pipeline and a domestic water distribution system for the Ute Mountain Ute Tribe. (The actual amount spent by Colorado was \$7.8 million.)
\$49.5 million from the United States, in three installments.

¹² The state of Colorado committed to the expenditure of \$60.8 million toward these purposes. This money has either been spent, or is on deposit as restricted funds. The state has spent \$7.8 million in the construction of the Towaoc Pipeline, \$5 million to the Tribal Development Fund, and \$300,000 towards a portion of the construction of the Animas-La Plata Project. The state has committed in restricted funds \$42.4 million held by the Colorado Water and Power Development Authority for the cost share toward phase I of A-LP, and \$5.3 million held in the construction fund of the Colorado Water Conservation Board toward cost share of the Ridges Basin Reservoir.

6. The parties agreed to seek Congressional relief from the Non-Intercourse Act¹³ limitations on Congressional oversight over the use of reserved water rights. The tribes were allowed to sell, exchange or lease water outside the Reservations, within or outside the state of Colorado, subject to state and federal law, interstate compacts and the law of the Colorado River.

The Settlement Agreement specified certain contingencies that had to be met before the settlement became final. The parties agreed to submit consent decrees to the Division 7 water court for judicial approval. A stipulation setting forth this commitment was filed, but was subject to legislative enactments by the United States Congress and Colorado legislature prior to becoming final.

Federal legislation was introduced, and was enacted in 1988.¹⁴ The Act approved the settlement and contained all the provisions contemplated by the parties, except for those relating to the interstate marketing of water. The legislation as introduced reflected the neutral nature of the Settlement Agreement concerning the legality of interstate marketing of reserved water rights under the Law of the River. However, Lower Colorado River Basin states adamantly opposed the provision, and demanded that the Tribes be flatly prohibited from applying for any out of state changes in place of use. Other western states objected to the potential reservation. The final act therefore limited use of Tribal rights in the Lower Colorado River Basin until final court order or agreement of all seven Colorado River Basin States has allowed such right for non-federal, non-Indian water rights. Moreover, the Act provides that any use of water off Reservation will result in the right being changed to a state of Colorado water right for the term of such use.

The Colorado General Assembly also enacted the legislation contemplated by the Settlement Agreement. This legislation appropriated \$5 million to the Tribal Development Funds, so much as needed for the Towaoc Pipeline, and \$5.6 million for the Ridges Basin cost sharing.

In December 1991, the Water Court approved the consent decrees that had been submitted to it based on the stipulations entered pursuant to the Settlement Agreement, and following the enactment of necessary federal and state legislation.

In summary, all of the conditions of the settlement have been satisfied, except for the construction of the Animas-La Plata Project, and the Agreement remains in effect.

1. The Settlement Agreement also established specific conditions concerning the administration and use of the water rights of the Tribes consistent with state law, including agreements concerning changes in use both on and off the reservations. Those agreements are critical to the integrated administration of Indian and non-Indian water rights.

¹³ 25 U.S.C. 177. The Non-Intercourse Act requires Congressional approval of the transfer of Indian trust property.

¹⁴ The Colorado Ute Indian Water Rights Settlement Act of 1988, P.L. 100-585, 102 Stat. 2973.

2. Under the Settlement Agreement, the Tribes have the right to receive the following amount of water, through the Project, from the Animas and La Plata Rivers:

Ute Mountain Ute Tribe: 6000 af/yr for m&i
26,300 af/yr for irrigation

Southern Ute Tribe: 26,500-af/yr m&i
3,400 af/yr irrigation

These are maximum amounts, subject to shortage sharing provisions.

3. Under the Settlement Act, the Tribes received several benefits, including Congressional relief from the Non-Intercourse Act and economic relief by relieving the obligation of the Tribes' repayment obligation until water is beneficially used.

4. The State of Colorado has complied with the requirements of the Settlement Agreement for significant cost sharing with, and financial responsibility to, the Tribes. The state has deposited \$5 million into the Tribal Development Fund, has spent \$7.8 million to construct the Towaoc Pipeline and domestic water distribution system, has spent \$300,000 toward cost-sharing for the Animas-La Plata Project, and has committed \$47.7 million toward cost-sharing for the Project.

5. The Project is the beneficiary of Colorado River Storage Project power revenues, both for the repayment of certain capital costs and for pumping costs.

6. Vested rights have been created under Colorado law to water rights in all of the various streams and rivers which are the subject of the Settlement Agreement. Extensive economies have developed in reliance on those rights.

The failure of all the parties to reach resolution of the Tribes' reserved rights claims on the Animas and La Plata Rivers may result in prolonged, expensive and divisive litigation.

Conclusion

The Settlement Act requires delivery of ALP water to the tribes by January 1, 2000, a date now past. If ALP is not approved and implemented by January 1, 2005, the Tribes have the option of commencing destructive litigation or renegotiating their reserved right claims. Further delays in finalizing the Settlement Agreement can no longer be tolerated.

At the foundation of the Settlement Agreement and this legislation is the construction of a significantly scaled-back Animas-La Plata Project (ALP) to provide water supplies to the Southern Utes and Ute Mountain Utes and the adjacent non-Indian communities in both Colorado and New Mexico. The State of Colorado endorses the modified structural alternative as described in S. 2508, which is fully compatible with the findings of extensive environmental reviews.

The alternative proposed is the 120,000 acre foot Ridges Basin Reservoir and a \$40 million development fund for use by the Tribes. The reduced project would provide only municipal and industrial water to the Ute Tribes, the Navajo Nation and the local cities and water districts. No irrigation water will be provided.

The potential impacts of ALP have been fully evaluated through exhaustive environmental reviews which are now nearing completion. In addition, the San Juan Recovery Implementation Program for endangered fish species has evaluated the project along with existing and future depletions. They concluded that the projects can be implemented while meeting suggested flow recommendations for the recovery of endangered fish in the San Juan basin.

The substantial reductions in this proposed project have not come without a price. The elimination of the originally contemplated facilities in the La Plata River drainage represents the loss of a significant opportunity for non-Indian water users in southwestern Colorado. Remaining non-Colorado Ute uses are limited to the San Juan Water Commission, Navajo Nation, the Animas-La Plata Water Conservancy District and the City of Durango. But the cost of proposed project has been cut by approximately 60% from previous project configurations and costs are within the ability of municipal and industrial users to repay.

The State of Colorado appreciates the Colorado Ute Indian Tribes' continued efforts to ensure that Tribal claims are resolved in a way that avoids taking water from other water users and ensures a reliable water supply for all residents of the area. We also commend the non-Indian project supporters for their willingness to compromise despite the great sacrifice to irrigators.

The State of Colorado has fulfilled its responsibilities arising from the Settlement Agreement and the Settlement Act of 1988. It is now time for the federal government to fulfill its commitment. The State strongly supports Senator Campbell's legislation. Let us bring this long-standing controversy to closure by passing S. 2508. Thank you for considering the State of Colorado's comments on this very important legislation.

ADDENDUM

A summary of the quantification in the various basins is set forth below:

Ute Mountain Ute Tribe

Mancos River Project reserved water right from the Dolores Project, up to 1000 af/yr m&i, 23,300 af/yr irrigation and 800 af/yr fish and wildlife development.
Non-project reserved water right for direct flow and/or storage of 21,000 af/yr for irrigation of 7200 acres.

Animas and La Plata Rivers Project reserved water right from the Animas-La Plata Project, up to 6000 af/yr m&i, 26,300 af/yr irrigation.

Navajo Wash Non-project reserved water right for diversion of 15 c.f.s., or 4800 af/yr for irrigation of 1200 acres.

San Juan River Non-project reserved water right for diversion of 10 c.f.s., or 1600 af/yr for the irrigation of 640 acres.

Southern Ute Tribe

Animas and La Plata Rivers Project reserved water right from the Animas-La Plata Project, up to 26,500 af/yr m&i, 3,400 af/yr irrigation.

Pine River The Tribe retained its right as quantified in the 1930 federal decree and the 1934 state decree, and a 1/6 interest in Vallecito Reservoir.

Florida River 563 af/yr for water from the Florida Project for the irrigation of 4 specified parcels.
6.81 c.f.s., or 1090 af/yr of non-project water right for the irrigation of specified parcels.

Stolsteimer Creek Non-project reserved water right for 1850 af/yr fill and refill in Pargin Reservoir, Non-project reserved water right for 2 c.f.s., Non-project reserved water right for 3.5 c.f.s., all for the irrigation of 60 acres.

Piedra River	Non-project reserved water right for 8.9 c.f.s., or 1595 af/yr, for the irrigation of 535 net acres.
Devil Creek	Non-project reserved water right for 183 af/yr for the irrigation of 61 acres.
San Juan River	Non-project reserved water right for 1530 af/yr for irrigation of 510 net acres.
Round Meadow Creek	Non-project reserved water right for 975 af/yr for the irrigation of 325 net acres.
Cat Creek	Non-project reserved water right for 1372 af/yr for the irrigation of 482 net acres.
Navajo River	No reserved rights.